(1)

No. 89-1886

IN THE

Supreme Court of the United States

October Term, 1989

ROY HERBERGER, TRUSTEE FOR THE LEE OPTICAL AND ASSOCIATED COMPANIES PENSION PLAN TRUST,
Petitioner,

vs.

THEODORE SHANBAUM,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RICHARD A. DEAN
Counsel of Record
ARTER & HADDEN
1717 Main Street, Suite 4100
Dallas, Texas 75201
(214) 761-2100
Attorney for Petitioner

Of Counsel
IRENE C. KEYSE-WALKER
GREGORY V. MERSOL
ARTER & HADDEN
1100 Huntington Building
Cleveland, Ohio 44115
(216) 696-1100

June 2, 1990

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QUESTION PRESENTED FOR REVIEW

Whether the anti-alienation provision of the Employee Retirement Income Security Act precludes the trustees of a plan from offsetting against a participant's pension benefits a judgment based upon that participant's breaches of fiduciary duties to the same plan.

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REPORTS OF DECISIONS DELIVERED BELOW

Herberger v. Shanbaum, 897 F.2d 801 (5th Cir. 1990)

Herberger v. Shanbaum, Case No. CA3-88-2984-F (N.D. Tex. May 1, 1989)

JURISDICTION

Petitioner seeks review of a decision of the United States Court of Appeals for the Fifth Circuit dated April 5, 1990, and entered that same date. App., A1. The mandate was stayed through June 2, 1990. No rehearing or extension of time within which to file this Petition has been sought. Jurisdiction is based upon 28 U.S.C. section 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

This case involves the following statutes:

29 U.S.C. §1109(a):

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

29 U.S.C. §1056(d)(1):

> Each pension plan shall provide that benefits provided under the plan shall not be assigned or alienated.

29 U.S.C. §1132(a):

> A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (l) of this section.

STATEMENT OF THE CASE

Respondent Theodore Shanbaum was one of three principal shareholders of Lee Optical, Inc. and a trustee of the Lee Optical and Associated Companies Pension Plan Trust (the "Plan"). Shanbaum is also a beneficiary of the Plan, and is currently drawing a monthly pension of $3,521.87.

In 1980, the United States Department of Labor ("DOL") commenced an action against Shanbaum and others alleging violations of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. sections 1001 *et seq.* Specifically, the DOL alleged that Shanbaum and the others had breached their fiduciary duties towards the Plan in violation of 29 U.S.C. section 1109(a). That action was settled under a consent decree that removed Shanbaum as a trustee and also held him liable to the Plan for over $1,000,000.

A subsequent Plan trustee, Oscar Lindemann, accepted certain assets in full satisfaction of the judgment against Shanbaum. When it was learned that those assets were worth far less than the judgment, the DOL brought an action against Lindemann, Shanbaum, and others, including Henry Klepak. Klepak was an attorney who had represented Lee Optical, Inc., the Plan, and Shanbaum during the relevant time period.

Lindemann was eventually found liable for $2,000,000 for breaches of his fiduciary duties to the Plan. Shanbaum and Klepak were held jointly liable for the judgment as "knowing and active participants" in Lindemann's breaches of fiduciary duties. Shanbaum did not appeal this judgment. Klepak and Lindemann did appeal, and the Fifth Circuit modified the judgment

obtained by the DOL. *Whitfield v. Lindemann*, 853 F.2d 1298, 1302 (5th Cir. 1988), *cert. denied sub nom., Klepak v. Dole*, 109 S. Ct. 2428 (1989).

Shanbaum was receiving pension benefits under the Plan when this second judgment was entered against him. The United States District Court for the Northern District of Texas permitted the Plan to offset the judgment against Shanbaum's benefits, but the Fifth Circuit reversed. *McLaughlin v. Lindemann*, 853 F.2d 1307 (5th Cir. 1988). That court held that the Plan could not offset the judgment because it had not been premised upon Shanbaum's own breaches of fiduciary duties while a trustee. It concluded that Shanbaum's knowing participation in a breach by a successor trustee was insufficient to warrant offset.

While that action was pending, the Plan, Shanbaum, and another trustee were defendants in yet another lawsuit, for unpaid bonuses, brought by a former employee of a liquidated corporation in which the Plan was a shareholder. The Plan asserted a cross-claim against Shanbaum and ultimately won a $20,000 judgment against him "for the breach of his fiduciary duty as trustee" of the Plan. Unable to collect this judgment through other means, the Plan sought an order from the United States District Court for the Northern District of Texas to allow it to offset the amount against Shanbaum's monthly pension benefits. Jurisdiction was proper in the District Court due to the existence of a federal question under 29 U.S.C. section 1132(a)(3).

The District Court allowed the offset, and Shanbaum appealed. On April 5, 1990, the Fifth Circuit reversed, holding that ERISA's anti-alienation provision, 29 U.S.C. section 1056(d)(1), precluded offset under any circumstances.

The Fifth Circuit's opinion creates a direct conflict between ERISA's enforcement provisions, which grant broad powers to fashion relief against corrupt trustees, and its anti-alienation provision, which protects pension benefits from judgment creditors, a question this Court expressly reserved in *Guidry v. Sheet Metal Workers National Pension Fund*, 110 S. Ct. 680, 685 (1990). As a result of the Fifth Circuit's over-extension of ERISA's anti-alienation provision, the Plan currently has a judgment against Shanbaum based upon his breaches of his fiduciary duties to it, but cannot satisfy that judgment or offset it against the generous benefits it is currently paying him, all at the expense of the participants and beneficiaries whose trust he betrayed.

REASONS WHY THE WRIT SHOULD ISSUE

THE TRUSTEES OF AN ERISA PLAN MAY OFFSET A JUDGMENT BASED UPON A PARTICIPANT'S BREACHES OF FIDUCIARY DUTIES TO THE SAME PLAN AGAINST THAT PARTICIPANT'S PENSION BENEFITS.

This case presents the question whether ERISA's anti-alienation provision, 29 U.S.C. section 1056(d)(1), supersedes its enforcement provisions when a trustee who has not satisfied a judgment based upon the breaches of his fiduciary duties to the plan seeks to receive pension benefits from the plan. As set forth below, the Fifth Circuit's decision seriously skews the balance between these provisions, with a potentially devastating impact on the Act as a whole, all contrary to ERISA's language and purposes.

A. ERISA Delegates Broad Powers to Courts to Fashion Appropriate Relief for the Breaches of Fiduciary Duties.

Section 409(a) of ERISA, 29 U.S.C. section 1109(a), provides that a person who breaches his fiduciary duties to a plan "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach . . . and shall be subject to such other equitable or remedial relief as the court may deem appropriate." Section 502(a) of ERISA, 29 U.S.C. section 1132(a), authorizes any plan participant, beneficiary, or fiduciary to bring a civil action "for appropriate relief under section 1109" or to obtain an injunction or "other appropriate equitable relief" to remedy a breach of fiduciary duties.

Many courts have recognized that these provisions necessarily provide courts with great latitude to fashion relief against persons who breach their fiduciaries to an ERISA plan. *See, e.g., Amalgamated Clothing & Textile Workers Union v. Murdock*, 861 F.2d 1406, 1409-13 (9th Cir. 1988) (imposition of constructive trust despite termination of plan); *Lowen v. Tower Management, Inc.*, 829 F.2d 1209, 1221 (2d Cir. 1987) (disregarding corporate form; disgorgement of profits); *Donovan v. Bierwirth*, 754 F.2d 1049, 1055-56 (2d Cir. 1985) (injunctive relief); *Donovan v. Mazzola*, 716 F.2d 1226, 1235 (9th Cir. 1983) (order requiring posting of $1,000,000 bond), *cert. denied*, 464 U.S. 1040 (1984); *Marshall v. Snyder*, 572 F.2d 894, 901 (2d Cir. 1978) (appointment of receiver); *Eaves v. Penn*, 587 F.2d 453, 462-63 (10th Cir. 1978) (recision of prohibited transaction).

B. ERISA's Enforcement Provisions Authorize an Offset against an Unfaithful Trustee's Pension Benefits.

In *Crawford v. La Boucherie Bernard Ltd.*, 815 F.2d 117 (D.C. Cir.), *cert. denied sub nom., Goldstein v. Crawford*, 484 U.S. 943 (1987), the Court of Appeals for the D.C. Circuit found that ERISA's fiduciary and enforcement provisions specifically enabled a plan trustee to offset a judgment based upon a participant's breaches of fiduciary duties to the same plan. In reaching that conclusion, the court relied not only upon ERISA's language, but also upon the common law of trusts incorporated by Congress into its provisions.

The *Crawford* court found that in the absence of an offset, a judgment based upon breaches of fiduciary duties could be unsatisfied and both the plan and its

participants would be deprived of the funds which were wrongfully taken from them. "Rather than to allow such an inequity," the court found, "traditional trust law would clearly support the forfeiture of the beneficial interest of a breaching fiduciary in order to offset the losses suffered by the trust." 815 F.2d at 120. As the court concluded in *Crawford*, ERISA's enforcement provisions authorize an offset of a judgment based upon a trustee's breaches of fiduciary duties against his pension benefits.

C. ERISA's Anti-Alienation Provision Does Not Preclude Offset.

ERISA's anti-alienation provision, 29 U.S.C. section 1056(d)(1), provides that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." In light of the dictates of ERISA's enforcement terms, this provision does not preclude offset in situations such as the present case, contrary to the Fifth Circuit's finding.

1. Courts Have Adopted, And Congress Has Approved, Other Exceptions to the Anti-Alienation Provision.

The strictures of ERISA's anti-alienation provision are not absolute. As the court found in *Crawford*, many courts have recognized exceptions to the anti-alienation provision, including exceptions for family support and community property obligations contained in divorce decrees. 815 F.2d at 121. Congress approved of these changes and incorporated them into ERISA in the Retirement Equity Act of 1984, now codified at 29 U.S.C. section 1056(d)(3).

2. A Contrary Interpretation Would Defeat ERISA's Purposes.

The exceptions were recognized to provide the flexibility needed to enforce the purposes of the Act. The purpose of the enforcement provisions is to force dishonest trustees to make restitution to the injured plans. Permitting offset would further the purposes of all of ERISA's terms, including its anti-alienation provision, by ensuring that plan assets will only be used for the payment of benefits. In this case for example, Shanbaum has already deprived the Plan, through the breaches of his fiduciary duties, the amount of benefits which the Plan seeks to offset. The relief requested by Petitioner will prevent the Plan from having to pay these benefits twice, and will preserve Plan assets for the rightful beneficiaries. In contrast, to construe ERISA's terms to defeat offset under these circumstances would defeat its purposes by allowing persons to breach their fiduciary duties with impunity.

D. The Decision in *Guidry v. Sheet Metal Workers National Pension Fund* Does Not Preclude Offset.

In declaring that ERISA's anti-alienation provision was absolute, the Fifth Circuit relied upon the decision in *Guidry v. Sheet Metal Workers National Pension Fund*, 110 S. Ct. 680 (1990). In that case, this Court found that a pension plan could not offset a judgment which did *not* arise from breaches of fiduciary duties owed to the plan against that person's pension benefits. This Court, however, repeatedly distinguished the situation in which the defendant, as here, had been found to have violated his fiduciary duties to the plan itself, stating that:

> We need not decide whether the remedial provisions contained in §409(a) supersede the bar on alienation in §206(d)(1), since petitioner has not been found to have breached any fiduciary duty *to a pension plan.*

110 S. Ct. at 685 (emphasis in original).

Indeed, the Court in *Guidry* cited the opinion in *Crawford*, which had permitted an offset under the same circumstances present in this situation, but did not express any opinion as to its continuing validity. 110 S. Ct. at 684 n.9. *Guidry*, therefore, did not undermine *Crawford's* validity, but expressly left open the question presented in this case, whether ERISA's anti-alienation provision takes precedence over its own enforcement provisions. ERISA's language, history, and purpose all demonstrate that it does not.

E. This Court Should Grant Certiorari to Resolve a Conflict Between Courts of Appeals, to Address a Question Left Open By Its Previous Decisions, And to Reverse a Decision Which is Contrary to the Statute And Its Purposes.

This Court should grant a writ of certiorari to review the Fifth Circuit's decision. First, that decision is in conflict with the opinion of the D.C. Circuit in *Crawford*. Although the Fifth Circuit attempted to rely upon the intervening decision in *Guidry*, it still recognized that the arguments presented in *Crawford* were "strong," that *Guidry* left the question presented in this case open, and that certain aspects of the *Crawford* court's reasoning remain "untouched" by *Guidry*. 897 F.2d at 803-04.

Second, the issue presented here has not been addressed directly by this Court. This case, in fact, presents the issue the Court expressly left open in *Guidry*. 110 S. Ct. at 685.

Finally, the result reached below is manifestly unfair and contrary to ERISA's purposes. Theodore Shanbaum is avoiding a judgment based upon his breaches of the fiduciary duties he owed to this pension plan. After having improperly used the pension plan assets, Shanbaum should not be permitted to obtain additional benefits at the expense of the participants and beneficiaries whose trust he has broken. Without a right of offset, many pension plans, like this Plan, will be left without any remedy against disloyal fiduciaries.

CONCLUSION

A pension plan should be permitted to offset a judgment based upon a trustee's breaches of his fiduciary duties against pension benefits payable by the plan. The Fifth Circuit's decision precluding such an offset was contrary to ERISA's language, history, and purposes, and contrary to the holdings of other courts considering the same issue. For these reasons, Petitioner respectfully requests review by this Court, reversal of the decision of the Court of Appeals for the Fifth Circuit, and reinstatement of the decision of the District Court below.

Respectfully submitted,

RICHARD A. DEAN
Counsel of Record
ARTER & HADDEN
1717 Main Street, Suite 4100
Dallas, Texas 75201
(214) 761-2100
Attorney for Petitioner
Roy Herberger, Trustee

Of Counsel

GREGORY V. MERSOL
IRENE C. KEYSE-WALKER
ARTER & HADDEN
1100 Huntington Building
Cleveland, Ohio 44115
(216) 696-1100

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(Decided April 5, 1990)

No. 89-1493

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

ROY A. HERBERGER, TRUSTEE FOR THE LEE OPTICAL AND ASSOCIATED COMPANIES PENSION PLAN TRUST,
Plaintiff-Appellee,

v.

THEODORE SHANBAUM,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas.

Before GOLDBERG, GARWOOD and DAVIS, *Circuit Judges.*

W. EUGENE DAVIS, *Circuit Judge.*

Theodore Shanbaum (Shanbaum) appeals the district court's holding that Roy Herberger (Herberger), the trustee of Shanbaum's pension plan, may offset an amount Shanbaum owes to the plan against Shanbaum's monthly pension benefits. We reverse.

I.

Shanbaum, along with Ellis Carp and Glen Auerbach, were the three principal shareholders of Lee Optical, Inc. (Lee Optical). All three served as charter trustees of the Lee Optical Pension Plan (the Pension Plan or the Plan), which was created in 1951. Shanbaum was also a beneficiary of the Plan. He is now seventy-seven years old and draws a monthly pension of $3,521.87.

Beginning in 1980, the U.S. Secretary of Labor initiated an action against Shanbaum, Carp, Lee Optical, and its subsidiary Dal-Tex, alleging violation of ERISA, 29 U.S.C. §1109(a), in connection with their management of the Pension Plan. In 1981, that action was settled in a Consent Decree that removed Shanbaum as sole-surviving trustee and appointed Oscar Lindemann (Lindemann) as his successor. In addition, the decree ordered the Dal-Tex subsidiary of Lee Optical to pay over one million dollars in outstanding principal and interest owed to the Plan, and held Shanbaum and Carp jointly and severally liable for this sum if Dal-Tex proved unable to pay.

Soon afterward, Dal-Tex defaulted, and the Plan sought to enforce the judgment against Shanbaum and Carp. In satisfaction of this debt, Lindemann accepted Shanbaum's and Carp's interests in SCP, a joint venture owned in equal shares by Shanbaum, Carp and the Plan. Later squabbling over the value of the joint venture's assets, however, resulted in a two million dollar judgment against Lindemann for breach of his fiduciary duty to the Plan. Shanbaum was held jointly liable for this sum as a "knowing and active participant[ ] in

Lindemann's breach of fiduciary duty." *Whitfield v. Lindemann*, 853 F.2d 1298, 1302 (5th Cir. 1988), *cert. denied sub nom, Klepak v. Dole*, _____ U.S. _____, 109 S.Ct. 2428, 104 L.Ed.2d 986 (1989).

Herberger, plaintiff-appellee, was appointed by the court to succeed Lindemann as trustee of the Plan. By this time, Shanbaum had begun receiving his pension payments, which were his only source of income. Unable to otherwise collect the debt, Herberger sought to offset Shanbaum's monthly benefit payment against the judgment rendered against Shanbaum's in *Whitfield*. The district court allowed the offset. On appeal, however, this court noted that the judgment against Shanbaum was not for the breach of a trustee's fiduciary duty; rather, the judgment was for participation in such a breach by a nonfiduciary third party. This court held that the anti-alienation provision of ERISA, 29 U.S.C. §1056(d)(1), prevented the offset and reversed the district court's order. *McLauglin v. Lindemann*, 853 F.2d 1307 (5th Cir. 1988).

During the pendency of this federal litigation, an unrelated lawsuit was filed in Texas state court by W.F. DeTournillon, who had at one time been an employee of the Grayson Company. Shanbaum, Carp and the Plan had been the sole shareholders of Grayson which had been liquidated in 1982. DeTournillon sought to recover salary and bonuses earned while he was an employee of Grayson, and since that corporation was defunct he sued its successors: Shanbaum, Carp's estate, and the Pension Plan.

The Pension Plan settled with deTournillon for $20,000. In September 1986, the state court awarded the plaintiff a $168,000 judgment against Shanbaum and Carp's estate, and also awarded the Pension Plan a $20,000 indemnification judgment against Shanbaum "for the breach of his fiduciary duty as trustee" of the Plan. Again, however, the Pension Plan's judgment against Shanbaum proved uncollectible and again, Herberger sought an order from the federal district court to allow the Plan to offset the outstanding judgment against Shanbaum's monthly pension benefits. The district court entered judgment allowing the offset. Shanbaum now appeals that judgment.

II.

Shanbaum argues that the district court erred in allowing an offset, because doing so violated the anti-alienation provision of ERISA, 29 U.S.C. §1056(d)(1). This provision states that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." This court has not previously addressed the question of whether, despite §1056(d)(1), a pension plan may offset a judgment against a former trustee's benefits when the judgment against the former trustee is predicated on a breach of his fiduciary duties.

This court held in *McLaughlin v. Lindemann*, 853 F.2d 1307 (5th Cir. 1988), that the general rule created by the anti-alienation provision of §1056(d))1), prevented an offset to recover a judgment for knowing participation by a nonfiduciary third party in the breach of fiduciary duty by a plan trustee. *See also*, 26 U.S.C. §401(a)(13) (tax code requirement that benefits under a

qualified plan cannot be assigned or alienated). Based on the two statutes cited above and on 29 U.S.C. §1053(a) (providing that an employee's pension benefit is nonforfeitable upon reaching retirement age), the *McLaughlin* court found a "clear congressional intent [that] courts should exercise great restraint in divesting plan beneficiaries of that which Congress decided should be vested." 853 F.2d at 1309. However, the court explicitly reserved the question presented by this case. *Id.*

In *Crawford v. La Boucherie Bernard*, 259 U.S. App. D.C. 2545, 815 F.2d 117, *cert. denied sub nom., Goldstein v. Crawford*, 484 U.S. 943, 108 S.Ct. 328, 98 L.Ed.2d 355 (1987), *reh. denied*, 484 U.S. 1020, 108 S.Ct. 735, 98 L.Ed.2d 683 (1988), the D.C. Circuit did carve out an exception to the general rule against alienation and allowed a judgment, predicated on breach of fiduciary duty by a plan trustee, to be offset against the trustee's pension benefits. The court gave a number of cogent reasons for its decision.

First, the court stated that the purpose of ERISA was to protect the interests of beneficiaries by establishing standards and obligations for fiduciaries and by providing remedies for breaches of such obligations. 29 U.S.C. §1001(b). The court further explained that 29 U.S.C. §1109(a) provided that in addition to liability for losses and restitution of wrongful profits, breaching trustees are "subject to such other equitable or remedial relief as the court may deem appropriate." Similar language is included in 29 U.S.C. §1132(a)(3)(B) which describes the type of relief available in civil actions

brought to enforce the ERISA requirements. The court concluded that provisions within ERISA gave courts broad authority to fashion remedies for redressing breaches.

Second, the *Crawford* court relied on language in ERISA's legislative history to conclude that the objective of ERISA remedial provisions was to "make applicable the law of trusts; . . . to establish uniform fiduciary standards to prevent transactions which dissipate or endanger trust assets; and to provide effective remedies for breaches of trust." *Crawford*, 815 F.2d at 120, *citing*, 120 Cong.Rec. S-15737, Aug. 22, 1974, *reprinted in*, 1974 U.S.Code Cong. & Admin. News 4639, 5177, 5186. After concluding that trust law was applicable, the court cited the well established trust principle that when a trustee who is also a beneficiary of the trust breaches his fiduciary duty to the trust, the other beneficiaries can force the trustee to make good his breach out of his beneficial interest in the trust. *Id., citing*, Bogert, *Trusts & Trustees*, §191 at 484 (2d ed. 1979); III *Scott on Trusts* § 257 at 2201 (3d ed. 1967).

Finally, the *Crawford* court addressed the anti-alienation provision directly and found that the general rule against alienability of ERISA benefits was not "immutable." The court explained that the Eleventh Circuit had carved out an exception for liabilities arising from the employee's criminal conduct towards his employer. See *St. Paul Fire & Marine Ins. Co. v. Cox*, 752 F.2d 550, 552 (11th Cir. 1985). In addition, other courts had permitted garnishment of benefits to satisfy family support and community property obligations. *See*,

e.g., American Telephone & Telegraph Co. v. Merry, 592 F.2d 118 (2d Cir. 1979); *Stone v. Stone,* 450 F.Supp. 919 (N.D. Cal. 1978), *aff'd,* 632 F.2d 740 (9th Cir. 1980), *cert. denied sub nom. Seafarers International Union v. Stone,* 453 U.S. 922, 101 S.Ct. 3158, 69 L.Ed.2d 1004 (1981).

Although the *Crawford* decision presents strong arguments for allowing an offset, we decline to follow it, primarily because of the Supreme Court's recent decision in *Guidry v. Sheet Metal Workers National Pension Fund, Inc.,* _____ U.S. _____, 110 S.Ct. 680, 107 L.Ed.2d 782 (1990), which calls the soundness of *Crawford* into question. In *Guidry,* the Court disallowed an offset against an employee's pension benefits where the employee, who did not owe a fiduciary duty to the pension plan, was convicted of embezzling union funds. The court concluded that Congress provided no exception to the ERISA anti-alienation provision that would allow the offset. Specifically, the court stated that the remedial provisions of ERISA did not outweigh the anti-alienation provision and, therefore, did not allow a constructive trust to be imposed in favor of the union.

Although the Court expressly reserved the question of whether an offset would be allowed where the employee's liability was predicated on a breach of fiduciary duty to the plan, the Court's dicta leads us to conclude that an offset should not be allowed. The Court stated that:

> As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text. The creation of such exceptions, in our view, would be especially problematic in the

> context of an antigarnishment provision. Such a provision acts, by definition, to hinder the collection of a lawful debt. A restriction on garnishment therefore can be defended only on the view that the effectuation of certain broad social policies sometimes takes precedence over the desire to do equity between particular parties. It makes little sense to adopt such a policy and then to refuse enforcement whenever enforcement appears inequitable. A court attempting to carve out an exception that would not swallow the rule would be forced to determine whether application of the rule in particular circumstances would be "especially" inequitable. The impracticability of defining such a standard reinforces our conclusion that the identification of any exception should be left to Congress.

Id.

The Court's decision in *Guidry* so undermines the *Crawford* reasoning that we decline to follow *Crawford*. First, the *Crawford* court's reliance on ERISA's legislative history to authorize the application of general trust law to create an exception to the anti-alienation provision is no longer persuasive. The Supreme Court found no justification to create an exception to the anti-alienation provision in order to impose a constructive trust on benefits. Also, the holdings in some of the cases relied on by *Crawford* to support the proposition that the anti-alienation provison is not "immutable" were rejected by the Court in *Guidry*. For example, *Guidry* holds that an employee's criminal misconduct cannot be the basis for an offset. This is contrary to the holding in *St. Paul Fire & Marine*, 752 F.2d 550, upon which *Crawford*

relied. In addition, *Guidry* recognized that "qualified domestic relations orders" are not covered by an express statutory anti-alienation exception. *Id.* at n. 18, *citing*, §104(a) of the Retirement Equity Act of 1984, 98 Stat. 1433, 29 U.S.C. §1056(d)(3) (1982 ed. supp. V). Therefore, the domestic relations cases cited by *Crawford* no longer support the *Crawford* court's decision to create a judicial exception to the anti-alienation provision. To the contrary, the fact that Congress amended the statute to allow this exception lends support to the notion that Congress will create exceptions where it sees fit and courts should not do so.

The only aspect of the *Crawford* reasoning that remains untouched by *Guidry* is the weighing of ERISA's remedial provisions against the anti-alienation provision. In *Guidry*, the Supreme Court held that the civil enforcement provision, 29 U.S.C. §1132(a)(3)(B), which allows a participant, beneficiary, or fiduciary to "obtain other *appropriate equitable relief* (i) to redress . . . violations or (ii) to enforce any provisions of this subchapter or the terms of the plan," (emphasis added) was not expansive enough to allow an offset. The *Crawford* court recognized the similarity between the above language contained in §1132(a)(3)(B) and the language contained in 29 U.S.C. §1109(a), the specific provision applicable in *Crawford* and in this case, which allows "equitable or remedial relief as the court may deem appropriate" when a person breaches the fiduciary duties. *Crawford*, 815 F.2d at 119. Based upon *Guidry's* strict application of the anti-alienation provision, we are persuaded that the Court would not find the language in §1109(a) expansive enough to allow an offset when the Court did not interpret equivalent language in §1132(a)(3)(B) to allow an offset. We conclude, therefore,

that Herberger should not be allowed to offset the *deTournillon* judgment against Shanbaum's pension benefits.

Because of our disposition of this appeal, we need not reach Shanbaum's two other contentions: (1) that the state court had no subject matter jurisdiction over Shanbaum's actions, therefore the state court judgment is void; and (2) that the trustee did not have authority to act on the plan's behalf.

REVERSED and RENDERED.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(Filed April 5, 1990)

No. 89-1493

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ROY A. HERBERGER, TRUSTEE FOR THE LEE OPTICAL AND ASSOCIATED COMPANIES PENSION PLAN TRUST,
Plaintiff-Appellee,

vs.

THEODORE SHANBAUM,
Defendant-Appellant.

D.C. Docket No. CA3-88-2984-F

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

Before GOLDBERG, GARWOOD, and DAVIS, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, IT is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed and judgment rendered for defendant in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that the plaintiff-appellee pay to the defendant-appellant the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: April 5, 1990

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

(Filed May 1, 1989)

Civil Action No. 88-2984-F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROY A. HERBERGER, TRUSTEE FOR THE LEE OPTICAL AND ASSOCIATED COMPANIES PENSION PLAN TRUST,

v.

THEODORE SHANBAUM.

ORDER DENYING MOTION TO DISMISS AND GRANTING SUMMARY JUDGMENT

Before the court are two motions: Defendant's Motion to Dismiss and Plaintiff's Motion for Summary Judgment. Having considered the motions, the responses thereto, and the pertinent authorities, the court finds that:

(1.) the Motion to Dismiss should be DENIED and that

(2.) the Motion for Summary Judgment is meritorious and should be GRANTED.

Theodore Shanbaum ("Shanbaum") is a former trustee of the Lee Optical and Associated Companies Pension Plan Trust ("the Plan") as well as a beneficiary

of the Pension Plan and receives monthly benefits in the amount of $3,521.87. A final judgment was rendered against Shanbaum on September 18, 1986 in the 162nd Judicial District Court of Dallas County, Texas in the amount of $20,000.00 plus 10% per annum post judgment interest in favor of the Plan.

Plaintiff, Roy A. Herberger, Trustee for the Lee Optical and Associated Companies Pension Plan Trust ("Trustee") filed his Original complaint for Interpleader and Declaratory Relief December 1, 1988 and has interplead Shanbaum's December, 1988 and January, February, March, and April 1989 pension benefits into the registry of this court. Trustee seeks to offset the Final Judgment against Shanbaum's pension benefits in the future until the Final Judgment has been satisfied.

The court has examined the traditional trust principles relied upon by Plaintiff herein and the reasoning and result reached in *Crawford v. La Boucherie Bernard, Ltd.*, 815 F.2d 117 (D.C. Cir.), *cert. denied*, _____ U.S. _____, 108 S.Ct. 328 (1987) (offset appropriate remedy and not precluded by other provisions) and finds that Shanbaum's pension benefits should be offset until such time as the Final Judgment is satisfied. Accordingly, the court will enter a judgment to that effect.

SO ORDERED this 1st day of May, 1989.

/s/ ROBERT W. PORTER
Chief Judge

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

(Filed May 1, 1989)

Civil Action No. 88-2984-F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROY A. HERBERGER, TRUSTEE FOR THE LEE OPTICAL AND ASSOCIATED COMPANIES PENSION PLAN TRUST,

v.

THEODORE SHANBAUM.

JUDGMENT

Having considered Plaintiff's for Summary Judgment and the pertinent authorities, the court finds that the Plaintiff is entitled to summary judgment in its favor.

It is therefore ordered that Plaintiff offset Defendant's pension benefits in the amount of $3,521.87 per month against the Final Judgment rendered against Defendant Shanbaum on September 18, 1986 in the 162nd Judicial District Court of Dallas County, Texas in the amount of $20,000.00 plus 10% per annum post judgment interest until said Final Judgment is satisfied.

It is further ordered that the funds interplead into the court's registry to date be paid to Plaintiff toward satisfaction of the Final Judgment.

SO ORDERED this 1st day of May, 1989.

/s/ ROBERT W. PORTER
Chief Judge

No. 89-1886

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

ROY HERBERGER, TRUSTEE FOR THE LEE OPTICAL AND ASSOCIATED COMPANIES PENSION PLAN TRUST,

Petitioner,

vs.

THEODORE SHANBAUM.

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

LAW OFFICES OF
JOE B. ABBEY
1717 Main Street
Suite 2220
Dallas, Texas 75201
(214) 748-0423
Counsel for Respondent

June 28, 1990

QUESTIONS PRESENTED

1. Was the Fifth Circuit reversal consistent with Supreme Court Decisions in that the Shanbaum State Court judgment was not brought for a prohibited transaction under ERISA?
2. Does the State Court have subject matter jurisdiction to render a judgment under ERISA?
3. Did Herberger, trustee, have authority to bring this action since there was not committee approval of such action?

PERTINENT CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

This case involves the following statutes:

29 U.S.C. Section 1056(d)(1):

> Each pension plan shall provide that benefits provided under the plan shall not be assigned or alienated.

29 U.S.C. Section 401(a)(13):

> A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated. For purposes of the preceding sentence, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment made by any participant who is receiving benefits under the plan unless the assignment or alienation is made for purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 [26 U.S.C.S. Section 4975] (relating to tax on prohibited transactions) by reason of section 4975(d)(1) [26 U.S.C.S. 4975(d)(1)]. This paragraph shall take effect on January 1, 1976 and shall not apply to assignments which were irrevocable on September 2, 1974.

29 U.S.C. Section 1109(a):

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

29 U.S.C. Section 1106(b):

> Transactions between plan and fiduciary. A fiduciary with respect to a plan shall not —
>
> > (1) deal with the assets of the plan in his own interest or for his own account,
> >
> > (2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or
> >
> > (3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

29 U.S.C. Section 1132(a)(2) and (e)(1):

> (a) Persons empowered to bring a civil action. A civil action may be brought —
>
> > (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 U.S.C. Section 1109];
>
> (e) Jurisdiction.
>
> > (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

LIST OF PARTIES

1. Roy Herberger, Appointed Trustee for the Lee Optical and Associated Companies Pension Plan Trust
2. Theodore Shanbaum — Respondent
3. David Witts, Richard A Dean and Patricia M. Reed of Arter & Hadden — Counsel for Petitioner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROY HERBERGER, TRUSTEE FOR THE LEE OPTICAL AND ASSOCIATED COMPANIES PENSION PLAN TRUST,

Petitioner,

vs.

THEODORE SHANBAUM,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

Respondent respectfully requests that the petition for Writ of Certiorari be denied.

STATEMENT OF THE CASE

The opinion of the United States Court of Appeals Fifth circuit correctly sets forth the statement of facts in this case.

Theodore Shanbaum ("Shanbaum") along with Ellis Carp ("Carp") and Glenn Auerbach ("Auerbach"), were the three principle shareholders of Lee Optical, Inc. ("Lee Optical"). All three served as charter trust-

ees of the Lee Optical and Associated Companies Pension Plan (the "Pension Plan"), which was created in 1951. They also were charter trustees of the Lee Optical and Associated Companies Profit Sharing Plan ("Profit Sharing Plan"). Shanbaum was also an employee beneficiary of the Pension Plan. He is now 78 years old, a pauper, and draws a monthly pension of $3,521.87.

In 1980 disputes arose between the Shanbaum family and the Carp family which resulted in Shanbaum's resignation as officer and director of Lee Optical. Beginning in 1980, the U.S. Secretary of Labor initiated an action against Shanbaum, Carp, Lee Optical, and its subsidiary Dal-Tex, alleging violations of ERISA (29 U.S.C. section 1109(a) in connection with the practice of contributing secured promissory notes instead of cash to the Plans. Shanbaum resigned as trustee September 21, 1981 by a Consent Decree.

Roy Herberger ("Herberger"), Plaintiff/Petitioner was appointed by the court as trustee of the Plan in 1983. David Witts ("Witts"), now with the law firm of Arter and Hadden, has represented the Pension Plan and Profit Sharing Plan since 1983 in conjunction with Herberger. Herberger and Witts are strangers to the Pension Plan and Profit Sharing Plan in that they were never shareholders, officers, employees of the sponsoring company, or beneficiaries of either Plan. The investment responsibilities of the Plans have been handled by Fisher Capital Management, Investment Bankers in New York. Herberger and Witts commenced to bring litigation against past trustees of the Plan, their attorneys and the sponsoring company, Lee Optical.

In September of 1986, the sponsoring company, Lee Optical, appointed three new members to the Pension Plan committee. However, Herburger and Witts refused

all communication with any members of the committee as ordered by the Plan. Thereafter, a business decision was made by the shareholders that the investment in Lee Optical was not worth a long term dispute with Herberger and Witts. Lee Optical was liquidated and the employee beneficiaries of the Pension Plan and the Profit Sharing Plan lost their jobs. The vexatious litigation brought by Herberger and Witts was the sole reason Lee Optical closed its doors. The obligations of the sponsoring company to the plans could have been met without the excessive administrative expense and attorneys fees incurred by Herberger and Witts.

During the pendency of these controversies, an unrelated lawsuit was filed in a Texas State Court by W.F. DeTournillon who at one time had been an employee of the Grayson Enterprises, Inc. ("Grayson"). Shanbaum, the Pension Plan and Carp had been the sole shareholders of Grayson, which had been liquidated in 1982. DeTournillon sought to recover salary and bonuses earned while he was an employee of Grayson and since that corporation was defunct, he sued its successors Shanbaum, Carp's estate and the Pension Plan.

Herberger and Witts settled with DeTournillon for $20,000.00. In September of 1986, the state court awarded plaintiff a judgment against Shanbaum and the Carp estate and also awarded the Pension Plan a $20,000.00 indemnification judgment against Shanbaum. Counsel for the Pension Plan cunningly inserted the language "for the breach of his fiduciary duty as trustee" even though this was a clear case of an employee/employer relationship and had nothing to do with ERISA. The Pension Plan judgment against Shanbaum proved uncollectable and Herberger sought an order from the Federal District Court to allow the

Plan to offset the outstanding judgment against Shanbaum's monthly pension benefit. Shanbaum is a pauper with no source of income except the Pension Plan and social security benefits. The District Court entered judgment allowing the offset. Shanbaum appealed and the Honorable United States Court of Appeals Fifth Circuit reversed.

Petitioners' statement of the case seeks to mislead the Honorable Supreme Court of the United States in that this case has nothing to do with Shanbaum's conduct as a trustee. Therefore it falls directly under the *Guidry v. Sheet Metal Workers National Pension Fund*, 110 S.Ct. 680 (1990). The DeTournillon case was a suit for indemnification as a joint shareholder and had nothing to do with any fiduciary duty to the Pension Plan.

Similarly, petitioners' inflamatory comment that "the Plan currently has a judgment against Shanbaum based upon his breaches of his fiduciary duty to it but cannot satisfy that judgment or offset against the generous benefits it is currently paying him all at the expense of the participants and beneficiaries whose trust he betrayed" in groundless. The DeTournillon suit has nothing to do with ERISA or any trust of the beneficiaries of the Pension Plan. Shanbaum's benefits were earned by Shanbaum over forty years of work. It was Shanbaum and Carp that funded the Plan. Indeed, Shanbaum voluntarily cashed in the benefits of $1,300,000 in the Profit sharing Plan and loaned the money to Lee Optical to pay its obligations requested by the Department of Labor. The DeTournillon judgment is presently the only judgment against Shanbaum by either Plan.

Petitioners conclude their brief by stating "after having improperly used the pension plan assets . . ." The statement is untrue. Nowhere has Shanbaum abused the

Plan for his personal gain. No case has ever found Shanbaum guilty of fraud or criminal conduct. *Whitfield v. Lindemann*, 853 F.2d 1298 (5th Cir. 1988) cert denied sub nom., *Klepak v. Dole*, 109 S.Ct. 2428 (1989); *McLaughlin v. Lindemann*, 853 F.2d 1307 (5th Cir. 1988); *Herberger v. Shanbaum*, 899 F.2d 801 (5th Cir. 1990).

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

The Fifth Circuit's reversal of Petitioner's judgment did not conflict with the decision of *Guidry v. Sheet Metal Workers National Pension Fund*, 110 S.Ct. 680 (1990). Like *Guidry*, the judgment against Shanbaum had nothing to do with ERISA or Shanbaum's conduct as trustee of the Pension Plan. This was a state court action that had nothing to do with prohibited transactions set forth in ERISA. Therefore, the issue is decided in the *Guidry* case.

The language slipped in the state court judgment "for the breach of his fiduciary duty as trustee" by counsel for the Pension Plan, instantly rendered the judgment void on its face for lack of subject matter jurisdiction. The United States District Court has exclusive subject matter jurisdiction for suits under ERISA.

The trustee Herberger had no authority to bring this suit without committee approval pursuant to the provisions of the Pension Plan.

ARGUMENT

I. THE FIFTH CIRCUIT REVERSAL WAS CONSISTENT WITH SUPREME COURT DECISION IN THAT THE SHANBAUM JUDGMENT WAS NOT BROUGHT FOR A PROHIBITED TRANSACTION UNDER ERISA

Petitioner, through misleading statements to this Honorable Supreme Court, argues that the Fifth Circuit decision seriously skews the balance between the enforcement provisions and the rights for pension benefits from the Plan. Petitioner is wrong. The only skewed conduct is the insertion of the language of the state court judgment of "breach of a fiduciary duty as a trustee" by Petitioner.

29 USC Section 1056(d)(1) provides that each pension plan may *not* be assigned or alienated. ERISA Section 206(d)(1). A provision almost identical is found in the companion tax provisions to ERISA in the Internal Revenue Code wherein assignment or alienation of benefits is also prohibited if a pension plan is to be qualified for tax benefits. See 26 USC Section 401(A)(13).

This court has stated in *Guidry* that no equitable exceptions to ERISA's prohibition on the assignment or alienation of pension benefits should be recognized by the courts. The identification of any exceptions should be left to Congress.

Shanbaum has not been found to have breached any fiduciary duty to the Pension Plans as trustee, despite the language in the state court case. The DeTournillon state court suit was not based on an ERISA claim. 29 U.S.C. section 1109(a) provides in pertinent part "any person who is a fiduciary with respect to a plan who

breaches any of the responsibilities, obligations or duties imposed upon a fiduciary *by this subchapter* . . ." (Emphasis supplied.) 29 U.S.C. section 1106 lists prohibited transactions between the plan and the fiduciary. The DeTournillon state court claim was merely a suit against an employer, Grayson and its three shareholders, by an employee of Grayson after its dissolution.

The DeTournillon state court action was not brought by the Secretary of Labor, a participant, a beneficiary, or a fiduciary of the Plan. The suit was for past compensation against the corporation which was partially owned by the Pension Plan. 29 U.S.C. section 1132(a)(2).

The DeTournillon's state court judgment dated September 18, 1986 with the inserted language "breach of fiduciary duty as trustee" was in conflict with the Consent Order dated September 21, 1981, removing Shanbaum as trustee. Lindemann was trustee at the time the suit was filed.

The DeTournillon state court judgment found no judgment of breach of prohibited acts under ERISA and there were no facts alleged or found that Shanbaum benefited as a result of the claim for back salary of an employee of Grayson.

In sum, the alleged breach of fiduciary duty as trustee by Shanbaum is a myth, perpetrated by Petitioner in his attempt to portray Shanbaum as an unfaithful trustee. Like the *Guidry* decision, this case is not a suitable decision to decide whether the remedial provisions contained in 409(a) supercede the bar on alienation in section 206(d)(1) since as a matter of fact, Shanbaum has not breached any fiduciary duty to the Pension Plan. The Petitoner's arguments that ERISA's anti-alienation provision and the decision in *Guidry* do not preclude

offset fail for lack of factual foundation of an unfaithful Trustee to his plan.

II. STATE COURT HAS NO SUBJECT MATTER JURISDICTION TO RENDER A JUDGMENT UNDER ERISA

29 U.S.C. section 1132(e)(1) provides in pertinent part "... the District Court of the United States shall have exclusive jurisdiction for Civil actions under this subchapter brought by the Secretary or by a participant or beneficiary or fiduciary."

The DeTournillon suit was not brought by the Secretary or by a participant, beneficiary or a fiduciary of the Plan. Nor was it bought under ERISA for liability for breach of a fiduciary duty or for a prohibited transaction 29 U.S.C. section 1106, 29 U.S.C. section 1109, 29 U.S.C. section 1104. Therefore, any finding that Shanbaum had breached his fiduciary duties as a trustee of the Pension Plan renders the judgment void on its face for lack of subject matter jurisdiction. While this issue was not addressed by the Honorable Court of Appeals for the Fifth Circuit, the issue renders this case unsuitable for the acceptance of the petition for writ of certiorari.

The preemptive clause in 29 U.S.C. section 1144 states that the provisions of ERISA shall supercede any and all state laws. This Honorable Court held in *Pilot Life Ins. Co. v. Dedeaux*, 107 S.Ct 1549 (1987), that the preemption clause of ERISA provides that ERISA supercedes all state laws insofar as they relate to employee benefit plans.

Under Texas law, a void judgment is a complete nullity and is without binding force in effect in either a tribunal which rendered it or any other court in which it may be brought in question. A void judgment is

subject to direct attack but also can be attacked collaterally in any other setting where rights are asserted under it. A judgment is void if the court rendering it has no jurisdiction of the subject matter of the suit. *Salazar v. U.S. Air Force*, 849 F.2d 1542 (5th Cir. 1988). *Steph v. Scott*, 840 F.2d 267 (5th Cir. 1988) *Robertson v. Ranger Ins. Co.*, 689 S.W.2d 209 (Tex. 1985); *Austin Independent School District v. Sierra Club*, 495 S.W.2d 878 (Tex. 1973); Hodges, *Collateral Attacks on Judgments* 41 Tex. L.Rev. 163 (1962). If a judgment is rendered by a court which lacks subject matter jurisdiction of the action, the judgment may be set aside by collateral attack and extrinsic evidence may be introduced to show the court lack of subject matter jurisdiction. *Nugent v. Nugent*, 270 S.W.2d 223 (Tex. Civ. App. — Beaumont, 1954, no writ); *McEwen v. Harrison* 162 Tex. 125, 345 S.W.2d 706 (Tex. 1969). Moreover, a question of subject matter jurisdiction can be raised at any time and cannot be waived. A void judgment is subject to collateral attack at any time and at any proceeding. *Soloman v. Massachusetts Bonding and Ins. Co.*, 347 S.W.2d 17 (Tex. Civ. App. 1961, writ ref'd); Hodges, *Collateral Attacks on Judgments* 41 Tex. L. Rev. 163 (1962).

III. HERBERGER HAD NO AUTHORITY TO BRING THIS ACTION SINCE THERE WAS NOT COMMITTEE APPROVAL OF SUCH ACTION.

Since the appointment of Herberger and the employment of Witts, the Profit Sharing Plan and Pension Plan have operated alone without constraint. Without checks and balances the Plans turned predator and devoured its former trustees and sponsoring company. Everyone that has touched Lee Optical has been sued, harassed, embarrassed, and run off. Lee Optical could have maintained its obligations to the Plans. Indeed, until 1982, the Plans were overfunded

On December 31, 1980, the audited assets available for beneficiaries of the Pension Plan was $7,381,430.00. On December 31, 1980, the audited assets available for beneficiaries of the Profit Sharing Plan was $7,051,201.00. At that time, both the Pension Plan and Profit Sharing Plan were overfunded for their obligations to the beneficiaries of the respective plans

By December 31, 1988, (the last reported statement) the certified assets available to beneficiaries under the Pension Plan was reduced to $1,997,202.00. By December 31, 1988 (the last reported statement) the certified assets available to beneficiaries of the Profit Sharing Plan was reduced to $4,488,754.00. Both the Pension Plan and Profit Sharing Plan are presently underfunded in that they do not have sufficient assets to pay their obligations to the beneficiaries. The difference must now be made up by the Pension Benefit Guarantee Corporation.

The following table shows the administrative costs and attorney fees for the years 1977 to 1982 at which time Shanbaum, Carp, and Lindemann administered the Profit Sharing Plan and the Pension Plan.

Years	Pension Plan	Profit Sharing Plan
1977.....	$ 17,600.00	$ 18,941.00
1978.....	$ 21,500.00	$ 20,906.00
1979.....	$ 38,000.00	$ 30,800.00
1980.....	$ 45,046.00	$ 41,171.00
1981.....	$124,627.00	$ 80,672.00
1982.....	*not available*	*not available*
	$246,773.00	$192,590.00

The following table represents the stated administrative fees and attorneys fees incurred by Herberger and Witts since 1983.

Years	Pension Plan	Profit Sharing Plan
1983.....	$ 205,623.00	$ 183,535.00
1984.....	$ 231,018.00	$ 204,612.00
1985.....	$ 194,840.00	$ 227,653.00
1986.....	$ 279,724.00	$ 155,527.00
1987.....	$ 238,649.00	$ 133,371.00
1988.....	$ 227,663.00	$ 143,200.00
	$1,377,517.00	$1,047,898.00

A comparison of the six year total of $444,283.00 prior to the expenses charged by Herberger and Witts of $2,425,415.00 represents almost a 600% increase.

Herberger has acted without committee approval to conduct business and file this suit. Pursuant to Article 10 of the Pension Plan, the Plan shall be administered by a retirement committee consisting of at least three per-

sons. Paragraph 10.2 *Committee Powers and Duties*, of the Plan provides in pertinant part "a majority of the members of the committee, which must include the planned administrator, shall constitute a quorum for the transactions of business. No action shall be taken except upon a majority vote of the committee members"

The Pension Plan merely echoes the command of ERISA. ERISA defines "administrator" as "the person so designated by the terms of the instrument under which the plan is operated", 29 U.S.C. section 1002(16). The Plan in this case expressly names a retirement committee as administrator of the Plan. The committee should conduct the business of the Plan and not the trustee. ERISA discusses the authority of the trustee of the plan "to manage and control the assets of the plan" but makes no mention of the authority for operating the plan or the plan's business which is left to the administrator, 29 U.S.C. section 1103.

There has been no committee acting nor has one been appointed pursuant to the Plan. Furthermore, no committee has met since September of 1986 when they were rebuffed by Witts. Herberger has moved from Dallas, Texas to Phoenix, Arizona. The Plan has been run defacto by Witts who brought the present action against Shanbaum. Herberger and Witts have no authority to conduct business or to bring this suit without approval of the committee. Herberger has exceeded his authority as trustee by bringing this action.

While Herberger was appointed pursuant to a suit filed by the Department of Labor, the order supplementing the Consent Order calls for the appointment of a retirement committee pursuant to Article 10 of the Pension Plan. However, the Plan has never been amended as required by ERISA, the Internal Revenue

Code, or the Department of Labor calling for sole authority into Herberger. The Internal Revenue Service has never approved any modification to the original plan for tax benefits. In his present status, the trustee is not answerable to anyone for his conduct incurring administrative and attorney's fees including the Internal Revenue Service, ex-employees, the beneficiaries or the liquidated sponsoring company.

The review by the Department of Labor has been impotent. Government employees in Washington, D.C. have not been able to properly control Herberger and Witts in Dallas, Texas. Not only has the sponsoring company been liquidated and the employee-beneficiaries thrown on the street, but the cost of administration has increased 600% and both the Pension and Profit Sharing Plans have been materially reduced in value.

CONCLUSION

On the merits, the Court of Appeals was correct in reversing and rendering the decision for Shanbaum. Petitioners filed their Petition in an attempt to mislead this Honorable Court in an emotional appeal that Shanbaum should not be permitted to obtain additional benefits at the expense of beneficiaries whose trust he has broken. This case has nothing to do with a disloyal fiduciary. The largest expense to both Plans, were the legal and administrative fees.

A trustee is still responsible to the Pension Plan for his conduct to the extent of all of the assets he owns. This case will not leave a Pension Plan without a remedy against disloyal fiduciaries. For the majority of cases, the trustee is not also an employee-beneficiary.

The Fifth Circuit's decision is in accordance with ERISA and this Honorable Court's decisions. The Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted,

LAW OFFICES OF
JOE B. ABBEY
1717 Main Street
Suite 2220
Dallas, Texas 75201
(214) 748-0423
Counsel for Respondent

APPENDIX

JUDGMENT OF THE 162ND DISTRICT COURT OF DALLAS COUNTY, TEXAS

Signed September 18, 1986

No. 8204793-I

W.F. DETOURNILLON VS. THEODORE SHANBAUM, ESTATE OF ELLIS CARP, LEE OPTICAL AND ASSOCIATED COMPANIES RETIREMENT PENSION TRUST AND SCP., A JOINT VENTURE	IN THE 162ND DISTRICT COURT OF DALLAS COUNTY, TEXAS

FINAL JUDGMENT

On this 8th day of August, 1986, came on be heard in open Court the above-entitled and numbered cause; and came the Plaintiff and Defendant THEODORE SHANBAUM in person and through their respective attorneys of record and announced ready for trial, the Plaintiff and Defendant LEE OPTICAL and ASSOCIATED COMPANIES RETIREMENT PENSION TRUST announced that the claims by the Plaintiff against it have been settled for the sum of $20,000.00 and that it was ready in its cross-claim against Defendant THEODORE SHANBAUM, and Plaintiff further announced that Defendant THE ESTATE OF ELLIS CARP has entered into an Agreed Interlocutory Judgment that is signed and filed herein; no jury having been demanded, all

matters of fact, as well as of law, were submitted to the Court; and the Court, having heard and considered the pleadings, evidence and argument of counsel, is of the opinion and finds that the Plaintiff is entitled to judgment against the Defendants, THEODORE SHANBAUM and THE ESTATE OF ELLIS CARP, jointly and severally, for the principal sum of $168,424.61 as prayed for in his First Amended Original Petition, together with interest thereon at the rate of ten percent (10%) per annum from date of judgment until paid in full, that the Plaintiff is entitled to judgment against the Defendant THEODORE SHANBAUM for reasonable attorney's fees as stipulated into the record by the parties and cost of court; and that Defendant LEE OPTICAL AND ASSOCIATED COMPANIES RETIREMENT PENSION TRUST is entitled to judgment against Defendant THEODORE SHANBAUM for the breach of his fiduciary duty as trustee of the LEE OPTICAL AND ASSOCIATED COMPANIES RETIREMENT PENSION TRUST to said Trust in the amount of $20,000.00 as prayed for in said cross-claim.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff, W.F. DETOURNILLON, do have and recover of and from the Defendants THEODORE SHANBAUM and THE ESTATE OF ELLIS CARP, jointly and severally, judgment in the sum of $168,424.61, together with interest thereon at the rate of ten (10%) percent per annual from date of judgment until paid in full, that said Plaintiff do have and recover of and from Defendant THEODORE SHANBAUM judgment for reasonable attorney's fees of $15,000.00 for trial of the case, $5,000.00 additional attorney's fees if an appeal is perfected to the Court of Appeals, $2,500.00 additional for attorney's fees if a writ

of error is sought and $2,500.00 additional for attorney's fees if a writ of error is granted.

IT IS FURTHER ORDERED by the Court that Defendant LEE OPTICAL AND ASSOCIATED COMPANIES RETIREMENT PENSION TRUST do have and recover of and from the Defendant THEODORE SHANBAUM judgment in the sum of $20,000.00 together with interest thereon at the rate of ten (10%) percent per annum from date of judgment until paid in full.

AND IT IS FURTHER ORDERED that all cost of court are taxed against the Defendant THEODORE SHANBAUM, for all of which let execution issue.

Signed: September 18, 1986

Catherine J. Crier,
Judge Presiding

APPROVED AS TO
FORM ONLY:

Wm. Chris Wolffarth
Attorney for Theodore Shanbaum

Rodney R. Elkins
Attorney for Lee Optical and Associated Companies Retirement Pension Trust

Don R. Kidd
Attorney for Plaintiff W.F. DeTournillon

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief in Opposition was placed in the United States Mail addressed to attorney of record, Richard A. Dean, 1717 Main Street, Suite 4100, Dallas, Texas 75201, on this the 28th day of June, 1990.

Joe B. Abbey
Attorney for Respondent

No. 89-1886

IN THE

Supreme Court of the United States

October Term, 1989

ROY HERBERGER, TRUSTEE FOR THE LEE OPTICAL AND ASSOCIATED COMPANIES PENSION PLAN TRUST,
Petitioner,

vs.

THEODORE SHANBAUM,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

RICHARD A. DEAN
Counsel of Record
ARTER & HADDEN
1717 Main Street, Suite 4100
Dallas, Texas 75201
(214) 761-2100
Attorney for Petitioner

Of Counsel
IRENE C. KEYSE-WALKER
GREGORY V. MERSOL
ARTER & HADDEN
1100 Huntington Building
Cleveland, Ohio 44115
(216) 696-1100

July 20, 1990

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

PERTINENT CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

This Reply Brief addresses the following statute in addition to those cited in the Petition for Writ of Certiorari:

1. 28 U.S.C. §1738

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory, or Possession, or copies thereof, shall be provided or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court witin the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

REPLY TO BRIEF OF THE RESPONDENT

This Reply Brief is addressed to arguments first raised in the Brief in Opposition filed by respondent Theodore Shanbaum ("Shanbaum").

Shanbaum's Brief does not address the split in the Circuits which the Fifth Circuit recognized in the decision below. It makes only passing reference to the negative impact which the Fifth Circuit's decision will have on the enforcement of judgments against trustees who have breached their fiduciary duties to pension plans. It makes no reference to this Court's express refusal last term to reach the issue presented in this case. *See Guidry v. Sheet Metal Workers National Pension Fund*, 110 S. Ct. 680, 685 (1990). Instead, Shanbaum relies upon contentions which the Fifth Circuit expressly did not reach, which are both outside and contrary to the record, and which do not in any way undermine the importance of the issue presented for review.

A. The Judgment Petitioner Seeks To Offset Is Valid.

1. Shanbaum Bore A Heavy Burden To Disprove The Existence Of Lawful Jurisdiction.

Shanbaum first asserts that the judgment which the plan seeks to offset against his pension benefits is invalid for lack of subject matter jurisdiction. Under 28 U.S.C. §1738, however, the district court was required to give full faith and credit to the decision of the state court, in which Shanbaum was held to have violated his fiduciary duties. Shanbaum bore the burden of establishing that the state court completely lacked

jurisdiction. *See, e.g., Williams v. North Carolina*, 325 U.S. 226, 233-34 (1945) (describing such a burden as "heavy"); *Salazar v. United States Air Force*, 849 F.2d 1542 (5th Cir. 1988) (enforcing state court judgment despite disagreement with that court's holding).

Texas courts likewise have recognized that a person seeking to attack a judgment carries the burden of proving that it should not be given full faith and credit. *McLendon v. Todd-Ao-Corp.*, 546 S.W.2d 653 (Tex. App. 1977). Accordingly, Shanbaum bore the burden before the district court to demonstrate that the state court which held him liable for his breaches of fiduciary duties to the Plan was utterly without jurisdiction.

2. *There Are Many Grounds On Which The State Court Could Have Based Jurisdiction.*

Although ERISA preempts many state law claims, its preemption, as this Court has often held, is not absolute. *See, e.g., Massachusetts v. Morash*, 109 S. Ct. 1668 (1989); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985). One exception expressly recognized in the statute exists for claims arising out of conduct occurring before ERISA's effective date, January 1, 1975. 29 U.S.C. §1144(b)(1). These claims are not subject to ERISA's preemption and exclusive federal jurisdiction, and, in fact, are not governed by federal law at all. *See, e.g., Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496 (9th Cir. 1984) (federal courts lack jurisdiction over claims arising before ERISA's passage). Claims for breaches of fiduciary duties by a trustee have long been held to be subject to the jurisdiction of state courts. *See, e.g., Menhorn*, 738 F.2d at 1501 n.4; *Mayflower Trust Co. v. Nowell*, 413 S.W.2d 783 (Tex. App. 1967).

3. The Judgment Is Binding Because Shanbaum Did Not And Could Not Have Negated The State Court's Jurisdiction.

Shanbaum made no effort to establish that the judgment against him did not fall within any of the exceptions to ERISA's preemption. Shanbaum put nothing in the record below relating to the state court action. Given this failure, the state court judgment must be treated as valid as long as it is possible to hypothesize a set of facts which would give jurisdiction to the state court. Further, it is not even necessary to hypothesize such a set of facts since Shanbaum was a trustee for twenty-four years before ERISA's enactment, and claims arising during that long period would unquestionably be subject to the jurisdiction of the state courts.

Likewise, although Shanbaum attempts to undermine the validity of the state court judgment by the suggestion that its language was prepared by the Plan's counsel, there is no evidence whatsoever in the record that that was the case. The judgment, which speaks for itself, unambiguously holds him liable for his breaches of fiduciary duties.

B. Herberger Undoubtedly Had The Authority To Pursue This Action.

Although Shanbaum complains at length that Herberger has no authority to bring this action (Brief at pp. 10-13), he does so only by ignoring a supplemental consent decree in the same action in which he was removed as trustee. A copy of that decree was filed below and is set forth in the Appendix to this Brief. That decree gave Herberger the power and responsibilities of

the plan's profit sharing committee, a body which Shanbaum concedes (at p. 12) had the authority to bring this suit. This argument is wholly contrary to the record and, in fact, the Fifth Circuit below expressly never reached it.

C. Shanbaum Breached His Fiduciary Duties To The Plan.

Finally, Shanbaum paints himself throughout his Brief as an innocent victim of a subsequent Plan trustee. This argument not only fails for want of support in the record, but actually defies the holdings of several courts, in which Shanbaum has been removed as trustee, held liable to the plan for judgments in excess of $1 million (twice), has been held liable for participating in breaches of fiduciary duties by others, and has been held liable for his own breaches of fiduciary duties to the Plan. Shanbaum's eleventh-hour attempts to recharacterize his conduct in those cases only typify the utter lack of remorse he feels for the Plan and the plan beneficiaries whose trust he has repeatedly betrayed.

CONCLUSION

This case presents an important issue concerning the ability of a pension plan to offset a judgment against a trustee who has breached his fiduciary duties to the plan against that individual's pension benefits. Shanbaum's arguments have no bearing on that issue, were not reached by the Fifth Circuit, and, in fact, actually defy the record. This Court should grant certiorari to resolve a conflict between Courts of Appeal, to address a question left open by its decision last term in *Guidry*, and to reverse a decision which is contrary to ERISA's language and its purposes.

Respectfully submitted,

RICHARD A. DEAN
Counsel of Record
ARTER & HADDEN
1717 Main Street, Suite 4100
Dallas, Texas 75201
(214) 761-2100
Attorney for Petitioner
Roy Herberger, Trustee

Of Counsel

GREGORY V. MERSOL
IRENE C. KEYSE-WALKER
ARTER & HADDEN
1100 Huntington Building
Cleveland, Ohio 44115
(216) 696-1100

APPENDIX

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

(Filed July 3, 1989)

Civil Action No. CA 3-80-0114-G

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ELIZABETH DOLE, Secretar of the
United States Department of Labor,
Plaintiff,

v.

THEODORE SHANBAUM, *et al.*,
Defendants.

ENTERED ON DOCKET 7-6-89 PURSUANT TO
F.R.C.P. RULES 58 and 79a.

ORDER

This case is before the court on the Motion of the Secretary of Labor to Amend this Court's Order Supplementing Consent Order entered on April 4, 1983. That Order is hereby amended to provide that they Roy Herberger is authorized to exercise the powers and shall

have the repsonsibilities of the Profit Sharing Committee and the Retirement Committee until September 24, 1990, or until further order of this Court.

Signed this 3 day of July, 1989.

A. JOE FISH
United States District Judge

Certified a true copy of an instrument on file in my office on 07/19/89 NANCY HALL DOHERTY, Clerk, U.S. District Court, Western District of Texas
By C. Thanos Deputy